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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-508

PHILIPPE BERNARD IZSAK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PHILIPPE BERNARD IZSAK,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the United States Supreme Court, October Term, 1978:

The petitioner, Philippe Bernard Izsak, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed August 22, 1978, affirming the judgment of conviction of the petitioner entered in the United States District Court for

the Central District of California.

OPINION BELOW

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed August 22, 1978. A copy of that memorandum opinion appears in the appendix hereto as Appendix "A"[1]. No opinion was rendered by the United States District Court for the Central District of California.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on August 22, 1978, affirming the petitioner's convictions on five counts of violating Title 21, U.S.C. § 841. A copy of the judgment in letter form, obtained from the Office of the Clerk, United States Court of Appeals for the Ninth Circuit, appears in the appendix as Appendix "B"[2]. The Court's jurisdiction is invoked pursuant to Title 28, U.S.C. § 1254(1) and Rule 22(2).

QUESTION PRESENTED

Whether the petitioner was entitled to be made aware of the *facts* considered by the sentencing court in imposing sentence, especially in view of a last-minute unexplained

[1] Appendix pages 1 through 6.

[2] Appendix page 7.

transfer of the case for sentence, which appears to have been occasioned by a bribery attempt directed at the original sentencing judge, made on the petitioner's behalf but without the petitioner's knowledge?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the United States Constitution provides in part:

> "No person shall . . . be deprived of life, liberty, or property without due process of law; . . . . "

STATEMENT OF THE CASE

On March 1, 1976, a multi-count indictment was returned in the Central District of California, charging the petitioner and four others with various crimes. The petitioner was charged in three counts with conspiracy to possess, manufacture and distribute amphetamine and phencyclidine; possession with intent to distribute amphetamines; and distribution of amphetamines. Thereafter, on April 26, 1976, a first superseding indictment was filed, charging the petitioner with the foregoing crimes but adding the additional substantive violations of manufacture of phencyclidine and possession with intent to distribute phencyclidine. Title 21, U.S.C. § 841(a)(1).

On November 12, 1976, after a court trial before the Honorable Albert Lee Stephens, the petitioner was found guilty on Counts One through Five of the first superseding

indictment. The matter was referred to the probation department and made returnable on December 13, 1976. On January 17, 1977, petitioner was ultimately committed for the maximum period, pursuant to a study under Title 18, U.S.C. § 4205(d). On April 27, 1977, the hearing for modification of sentence after the study was set for May 2, 1977. On May 3, 1977, the court, through the Honorable Albert Lee Stephens, on its own motion, continued the sentencing hearing to May 16, 1977. Thereafter, on May 9, 1977, the Honorable Albert Lee Stephens advanced the sentencing to May 13, 1977. On May 12, 1977, the Honorable Frances Whelan, acting for the Honorable Albert Lee Stephens, transferred the case to the Honorable Howard B. Turrentine, who is regularly assigned to the United States District Court for the Southern District of California. The very next day, May 13, 1977, the petitioner was sentenced before the Honorable Howard B. Turrentine to five years on Counts One, Three and Five, running concurrent to each other, and three years on Counts Two and Four, running consecutive to the terms imposed on Counts One, Three and Five.

The petitioner, on June 18, 1977, filed a timely notice of appeal from the judgment, after the imposition of the maximum term and the order for a study.

After the matter had been docketed with the United States Court of Appeals for the Ninth Circuit, the petitioner became aware that an indictment had been filed in the United States District Court for the Central District of California. That indictment, filed on July 19, 1977, charged two individuals with having attempted to "corruptly endeavor to influence Chief Judge Albert Lee Stephens, Jr., Chief Judge

of the United States District Court" with regard to the sentence in the petitioner's case. A copy of the indictment returned in the matter, entitled "United States of America v. Harold Glickman and James Rowe" is appended hereto as Appendix "C"[3] and incorporated herein by this reference. The petitioner thereafter filed in the Court of Appeals a "Motion for Immediate Remand for Resentencing." That document was filed on or about August 18, 1977. That motion alleged the procedural circumstances described above, and set forth the petitioner's contention that the sentencing was transferred from Judge Stephens to Judge Turrentine based upon the alleged attempt to bribe Judge Stephens in order to obtain favorable treatment in the sentencing of the petitioner. The motion further set forth that the petitioner was unaware of the reason or basis for the last-minute transfer of sentencing, and was unaware of the attempt to influence the sentencing judge. A copy of the affidavit of Victor Sherman, petitioner's then counsel, filed in support of the motion for remand is appended hereto as Appendix "D"[4] and incorporated herein by this reference.

The memorandum opinion of the Court of Appeals, filed August 22, 1978, denied the petitioner's motion for remand for resentencing and denied the petitioner's contention that the sentence was illegally imposed. See Memorandum Opinion, part III (Appendix pp. 5 and 6).

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[3] Appendix pages 8 through 10.

[4] Appendix pages 11 through 15.

REASONS FOR GRANTING A WRIT

The extent to which a defendant must be informed of the facts relied upon by a sentencing court in imposing sentence is an area of law unsettled in this Court and which has created substantial disagreement in the various circuit courts of appeals.

This petitioner was sentenced in the District Court at a time when individuals, unbeknownst to the petitioner, had engaged in conduct which is abhorrent to all who participate in the judicial system. The despicable nature of this third-party action was all the more intolerable because it was directed at the Chief Judge of the Central District of California. Against the background of this bribery attempt, the Chief Judge properly recused himself. A judge from a neighboring and proximate district was assigned one day before the petitioner was to be sentenced. The petitioner and his then counsel were totally unaware and taken by surprise that the transfer should have occurred at all. They had no knowledge, nor were they informed, of the reason behind the transfer. The petitioner had no opportunity to rebut the insinuation which must have certainly existed that the bribery attempt made on his behalf was accomplished with his knowledge and consent. In fact, the petitioner was not even put on notice that there was a need to rebut *any* insinuations. In his mind, he was coming before the court to be sentenced, albeit on a serious charge, without any prior criminal history and at a time when he, himself, was studying law and endeavoring to become an attorney. His history and background argued in favor of leniency, and had he been aware that there existed a substantial possibility that his

good character–the strongest argument at his sentencing–may have been besmerched by the actions of others, he could have taken the appropriate steps to cure the damage. He was, however, not given that opportunity, and the decision of the court below asserts that the District Court was under no obligation to inform the petitioner of the reason for the last-minute transfer, nor was the sentencing judge required to disclose his understanding of the basis for the transfer nor his knowledge, if any, of the allegations of attempted bribery.

In making its determination upon this issue, the court below necessarily entered an area of the law unsettled in this Court and upon which there is more than substantial disagreement in the circuit courts of appeals.

The question presented by this petition revolves around the extent to which a sentencing court is required to disclose to the defendant the *facts* relied upon by the court in exercising its sentencing discretion. In contradiction to the analysis made by the court below, the petitioner is not asserting that the sentencing judge was required to "state his *reasons* for the sentence imposed," but only that he state the *facts* relied upon.

The case most often cited as the starting point in an analysis of the extent to which a sentencing court must disclose facts to a defendant is this Court's opinion in *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079 (1949). However, the meaning and scope of *Williams* is subject to question even by this Court. See *Specht v. Patterson*, 386 U.S. 605, 87 S. Ct. 1209 (1967). It should thus not be surprising that the circuit courts of appeals have undertaken to fill the void left by the ambiguity in *Williams* and *Specht*,

and have done so in a less than uniform fashion.

The circuits disagree on the requirements imposed by *Williams* upon the sentencing court. Compare *United States v. Weston*, 448 F.2d 66 (9th Cir. 1971) and *United States v. Pickard*, 464 F.2d 215 (1st Cir. 1972), with *United States v. Dace*, 502 F.2d 897 (5th Cir. 1974), at page 901, *et. seq.*, dissent of Judge Lay, J. It is generally agreed, however, that the question is one upon which there exists substantial "debate." *United States v. Perri*, 513 F.2d 572 (9th Cir. 1975).

Nor is there uniformity upon the showing which must be made by a defendant in order to invoke whatever protections exist within *Williams*, *Specht*, and *United States v. Tucker*, 404 U.S. 443, 92 S. Ct. 589 (1972). The Fifth Circuit appears to require a much more substantial "threshhold" showing than do other circuits. Compare *United States v. Rollerson*, 491 F.2d 1209 (5th Cir. 1974) and *United States v. Dace, supra*, with *United States v. Weston, supra*, and *United States v. Pickard, supra*. In the present case, moreover, a substantial question exists whether the petitioner has ever been in a position to make any threshhold showing that improper material was considered by the District Court in view of the fact that the court at no time informed the petitioner of any of the facts which surrounded the transfer or imposition of sentence.

The issue raised in this case and by the opinion of the court below is one which can be considered on a very limited record. For, it is in a very real sense the absence of a sufficient record which forms the basis of the petitioner's claim for relief. Because he was not given notice of the facts, the petitioner at no time had an opportunity to rectify what-

ever harm had occurred. However, it is particularly clear that the possibility, if not probability, of prejudice to this petitioner has been shown by the unusual procedure followed in the District Court and the subsequent indictment for attempted bribery returned in the Central District. The petitioner has received a substantial sentence[5]. The potential prejudice to him, therefore, was great. An appropriate inquiry into the facts surrounding the sentencing hearing and their effect, if any, upon the sentencing court, imposes but a minimal interference with the judicial process, but is one which the Constitution demands. *United States v. Tucker, supra*.

CONCLUSION

For each of these reasons, it is respectfully requested that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DONALD M. RE

Attorney for Petitioner

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[5]The petitioner argued below that, in fact, the consecutive sentences imposed were improper. The petitioner received a sentence of five years on each of three counts, and a sentence of three years on each of two other counts. The petitioner argued that the three-year sentences, as a matter of law, should have merged in those offenses giving rise to the five-year sentences.

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APPENDIX "A"

MEMORANDUM OPINION

In the United States Court of Appeals for the Ninth Circuit.

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. PHILIPPE BERNARD IZSAK, Defendant-Appellant.

No. 77-1312.

(UNITED STATES OF AMERICA vs. ANDREW SURINA, JR. - No. 77-1313.

UNITED STATES OF AMERICA vs. JEFFREY MARK STERNBERG, No. 77-1396.)

[FILED AUG 22 1978]

Appeal from the United States District Court for the Northern District of California

Before: CHAMBERS and ANDERSON, Circuit Judges, and GRANT, District Judge*

Izsak, Surina and Sternberg appeal from judgments of conviction for conspiracy to manufacture amphetamine, its possession and distribution. Izsak and Surina also appeal from judgments of conviction for the manufacture and distribution of phencyclidine (PCP). We affirm.

I

Izsak and Surina attack the validity of a search warrant. First, they argue that the oral affidavit of DEA agent Kenney

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*The Honorable Robert A. Grant, United States District Judge for the Northern District of Indiana, sitting by designation.

was insufficient to establish probable cause for the issuance of the warrant. According to that affidavit, agents connected Izsak to the manufacture of amphetamine through information given by an informer. Agents followed Izsak to 17900 Bull Canyon Road. At that address, agents observed individuals carrying white powder from a mobile home to the residence. On that same day, appellant Sternberg delivered amphetamine powder to the informer. From observations of vehicles leaving the Bull Canyon location, agents concluded that this amphetamine powder had come from there. While arresting individuals at the Bull Canyon location, agents observed chemicals used in the manufacture of amphetamine and PCP. These facts were sufficient to justify the issuance of the warrant for the subsequent search.

Second, appellants contend that certain parts of the affidavit could not be relied upon to support the findings of probable cause. We disagree. The affidavit satisfied the two prong test of *Aguilar v. Texas*, 378 U.S. 108, 114 (1964). It contained facts demonstrating that the informer had direct contact at least twice with the conspirators.[1] And the agent testified that he had corroborated information from this informer on prior occasions. *U. S. v. Bowers*, 534 F.2d 186, 192 n. 5 (9th Cir. 1976). Additionally, information from an informant of no proven reliability may, if detailed and corroborated by observation, be used to support a finding of probable cause. *Spinelli v. U. S.*, 393 U.S. 410, 416 (1969); *U.S. v. Moreno*, 569 F.2d 1049, 1051 (9th Cir. 1978). The informer's statements about the delivery of amphetamine

[1]The fact that it was later determined that another conspirator and not Izsak was the individual who called the informant does not affect the weight to be given the affiant's good faith statements. *Franks v. Delaware*, ... U.S. ..... (slip opinion June 26, 1978).

powder were corroborated by DEA agents.

And agents had probable cause to arrest Surina. Earlier in the day of arrest, agents had observed Surina carrying powder from a mobile home to the residence at 17900 Bull Canyon Road. Later in that day, Sternberg delivered to an informer and DEA agents a dark suitcase containing amphetamine powder. Agents had reasonable cause to believe that this powder came from 17900 Bull Canyon Road. And prior to driving away from the Bull Canyon residence, Surina placed a dark briefcase into the automobile. Agents had probable cause to believe that Surina was participating in the manufacture and distribution of amphetamine.

Agents were also justified in entering the residence at Bull Canyon without a warrant to arrest the occupants. *U. S. v. Flickinger*, 573 F. 2d 1349, 1354-57 (9th Cir. 1978). Even if exigent circumstances are required to justify the failure to obtain a warrant, we see no error in the district court's ruling.

Third, appellants claim that the warrant was void because the descriptive term was too broad. The warrant authorized only a search for evidence relating to criminal activity in the manufacture and distribution of controlled drugs. *Andresen v. Maryland*, 427 U.S. 463, 478-82 (1976). As long as the objects sought could reasonably be found in the area searched, the fact that a search requires an examination of items that are private does not offend the Fourth Amendment.[2]

[2]Izsak, by supplemental brief, raises an additional attack on the warrant. He argues that the warrant is invalid under California law because a California magistrate has no statutory authority to issue a warrant to a federal officer. Despite its outward appearance, the warrant issued by the California judge was a "federal warrant." *U. S. v. Burke*, 517 F.2d 377, 381-84 (2d Cir. 1975). The California judge issued it pursuant to the authority granted him by Rule 41(a), F.R.Crim.P.,

II

We disagree with Sternberg's characterization of his confession as involuntary. According to Sternberg, he was exhausted, hungry and questioned almost continuously from 7:30 P.M. until 11:00 P.M. In this weakened condition, he consented to make a statement in exchange for promises of a recommendation for probation and for release on his own recognizance pending trial. But Sternberg's own testimony undermines his arguments to us. And the district court resolved factual conflicts against him. Accordingly, the district court did not err in finding that Sternberg's confession resulted from the exercise of his own free will.

We also reject Sternberg's contention that agents refused to honor his request for an attorney. Agents informed Sternberg of his rights before transporting him to their office. Upon arrival in the interview room, the agent asked Sternberg the questions necessary to fill out the personal history form. As the agent began, Sternberg asked, "Will I be able to call my attorney?" The agent assured him that he would have an opportunity after he had completed the booking procedure. When the booking of Sternberg was completed, agents again informed him of his rights and began to question him about the case. The district court found that Sternberg's question was his only reference to his right to counsel. This finding is not clearly erroneous. And Sternberg's question is too ambiguous an assertion of his right to have counsel present to preclude further questioning under *Escobedo v.*

2 cont'd
to issue a federal warrant as a state court of record. While the warrant did not comply with Rule 41 in all respects, no reversible error was committed. *U. S. v. Garrett*, 565 F.2d 1065, 1071 (9th Cir. 1977); *U. S. v. Burke*, 517 F.2d at 384-87.

Illinois, 378 U.S. 478 (1964), and *Miranda v. Arizona*, 384 U.S. 436 (1966).

We find no merit in Sternberg's argument of improper joinder under Rule 8(b), F.R.Crim.P. The substantive offenses charged in the indictment were acts in furtherance of the conspiracy. The grand jury named Sternberg as one of the conspirators. Joinder was proper. *U. S. v. Roselli*, 432 F.2d 879, 898-900 (9th Cir. 1970). And nothing in the record supports his allegations of prejudice.

III

Izsak makes several attacks on his sentence. First, he argues that a bribery attempt on his behalf may have influenced the judge from outside the district who was designated to sentence him. We have no power to review a sentence that is within the bounds set by the statute. *U. S. v. Thompson*, 541 F.2d 794, 795 (9th Cir. 1976). We can, however, examine "the *judicial process* by which the particular punishment was determined." *Dorszynski v. U. S.*, 418 U.S. 424, 443 (1974), quoting *U. S. v. Hartford*, 489 F.2d 652, 654 (5th Cir. 1974); *U. S. v. Perri*, 513 F.2d 572 (9th Cir. 1975). But nothing in the record before us suggests that the sentencing judge knew about the bribery attempt or connected it with these appellants. Nor does the transcript of the sentencing hearing give us any cause to suspect that the sentence was based on information about the attempted bribery. The judge explained his reasons for the sentences.[3] In effect, Izsak's argument is that the district court erred by failing to expressly disclaim any consideration of the bribery

[3]But from reading the pre-sentence reports, it appears that Mr. Izsak blames Mr. Surina and Mr. Surina blames Mr. Izsak.
I would guess the best thing I could say is that they were joint venturers,

attempt in sentencing him. Even if we assume the judge knew about the bribery attempt, this argument fails. Because of the limited scope of appellate review of a sentence, we do not require a district court to state his reasons for the sentence imposed. *U. S. v. Thompson*, 541 F.2d 794, 795-96 (9th Cir. 1976). It necessarily follows that the district court need not state in open court the factors he did not consider.

Izsak's argument that Rule 25, F.R.Crim.P., was violated is also without merit. The record gives every indication that the sentencing judge was well prepared to perform his duties.[4]

IV

The motion for remand for resentencing is DENIED. The judgments of conviction of all appellants are AFFIRMED.

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3 cont'd
at least joint venturers, in a rather large drug manufacturing business. There was considerable money invested in it. The exact amount I don't know. There is some mention made of some tremendous sums, that there was a considerable sum of money invested in the venture.

Who else was involved we don't know, but it is clear that Mr. Izsak and Mr. Surina were both involved.

If they are not drug addicts who broke the law to support a habit, they are not mules who drove a car from point A to point B to support a wife and child. They went into this as intelligent men for gain.

I am convinced that if they had not been apprehended, that they would have made thousands of dollars in the venture.

Be that as it may, I am also disturbed somewhat about the guns that were found. As I recall, Mr. Izsak said he was a collector. Maybe he was and maybe he wasn't, but the revolver that he had was available at the time he was arrested, a stolen revolver, I think, from a burglary in Van Nuys, if I recall the report correctly. It was a .38 with a two-inch barrel, referred to in the pre-sentence report, if my memory serves me correctly.

[4]By way of supplemental brief, Izsak argues that certain offenses merged for purposes of sentencing. This issue has never been presented to the district court. It possibly can still be raised in the district court by way of a Rule 35 motion. Rule 35, F.R.Crim.P. We will not consider it here.

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Notice of Entry of Judgment

Please take notice that the judgment was filed and entered in the case noted on the attached disposition (opinion, memorandum or order). Also, please take special notice of the date of filing as it represents the date of entry of judgment.

Important Time Periods

There are fourteen (14) days from the date of entry of judgment in which to file a petition for rehearing. The mandate of the court shall issue twenty-one (21) days after the entry of judgment unless the court orders otherwise. If the court enters an order denying the petition, the mandate will issue (7) days thereafter. For further information regarding these processes, please refer to Rules 36, 40 and 41 of the Federal Rules of Appellate Procedure.

INDICTMENT

**(18 U.S.C. § 371: Conspiracy;
18 U.S.C. § 1503: Corruptly Endeavoring to
Influence an Officer of a Court of the United States)**

In the United States District Court for the Central District of California.

March 1977 Grand Jury.

UNITED STATES OF AMERICA, Plaintiff, v. HAROLD GLICKMAN, aka Hal GLICKMAN; JAMES ROWE, Defendants.

No. CR 77-937.

[FILED JUL 19 1977]

The Grand Jury charges:

COUNT ONE
(18 U.S.C. §§ 371; 1503)

Beginning on a date unknown to the Grand Jury and continuing until on or about April 8, 1977, in Los Angeles County, within the Central District of California, defendants HAROLD GLICKMAN, also known as Hal Glickman, and JAMES ROWE, and others both known and unknown to the Grand Jury, did wilfully and knowingly combine, conspire, confederate and agree with each other to commit an offense against the United States of America, in violation of Title 18, United States Code, Section 1503, to wit: to corruptly endeavor to influence Chief Judge Albert Lee Stephens, Jr., Chief Judge of the United States District Court for the Central District

of California, an officer of a Court of the United States, in the exercise of his official duties.

The object of said conspiracy was to cause the sum of $50,000.00 to be offered, directly or indirectly, to Chief Judge Albert Lee Stephens, Jr., in order to obtain from Chief Judge Stephens favorable treatment in the sentencing or bail status of Philip Iszak, a defendant in a criminal prosecution then pending before said Chief Judge Stephens.

In furtherance of the conspiracy, and in order to effect the object thereof, defendants GLICKMAN and ROWE performed the following overt acts in the Central District of California:

1. On or about April 4, 1977, defendant HAROLD GLICKMAN had a telephone conversation with a confidential informant.

2. On or about April 8, 1977, defendants HAROLD GLICKMAN and JAMES ROWE had a meeting with Diane Eagan, an investigator for the District Attorney for Los Angeles County, then acting in an undercover capacity, and a confidential informant.

3. On or about April 8, 1977, defendants HAROLD GLICKMAN and JAMES ROWE discussed with Diane Eagan and the confidential informant the terms and conditions of a plan to influence the action of Chief Judge Stephens in his official capacity.

4. On or about April 8, 1977, defendants HAROLD GLICKMAN and JAMES ROWE had a meeting with a confidential informant.

5. On or about April 8, 1977, defendants HAROLD GLICKMAN and JAMES ROWE had a conversation with a confidential informant.

COUNT TWO
(18 U.S.C. § 1503)

On or about April 8, 1977, in Los Angeles County, within the Central District of California, defendants HAROLD GLICKMAN, also known as Hal Glickman, and JAMES ROWE, corruptly endeavored to influence Chief Judge Albert Lee Stephens, Jr., of the United States District Court for the Central District of California, in the discharge of his official duties as an officer of a Court of the United States. In committing said offense, defendants GLICKMAN and ROWE corruptly endeavored to cause the sum of $50,000 to be offered, directly or indirectly, to Chief Judge Stephens in order to obtain favorable treatment in the sentencing or bail status of Philip Iszak, a defendant in a criminal prosecution then pending before said Chief Judge Stephens.

A TRUE BILL

Foreman

WILLIAM D. KELLER
United States Attorney

AFFIDAVIT OF VICTOR SHERMAN

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

VICTOR SHERMAN, being first duly sworn, deposes and says:

1. Affiant is an attorney at law duly licensed to practice before the Courts of the State of California, before the United States District Court for the Central District of California and before this Honorable Court. Affiant has recently substituted as attorney of record in the place and stead of Appellant's trial counsel, Paul Caruso. Affiant is informed and believes that an Appellant's Opening Brief, an Appellee's Brief, and an Appellant's Reply Brief have been filed in the instant matter.

2. Affiant is of the opinion that an immediate remand for re-sentencing is essential in this matter. Affiant is informed from discussions with the Appellant and from a review of the docket entries in the District Court regarding this matter of the following chronology of events:

a. On November 12, 1976, after a court trial before the Honorable Albert Lee Stephens, the Appellant IZSAK was found guilty on Counts I through V of the first superceding Indictment. The matter was referred to the Probation Office and was made returnable on December 13, 1976. On January 17, 1977, the Appellant was ultimately committed for the maximum period pursuant to a study under 18 U.S.C. § 4205(d). On April 27, 1977

the hearing for modification of sentence after the study was set for May 2, 1977. On May 3, 1977, the Court, through the Honorable Albert Lee Stephens, on its own motion, continued the sentencing hearing to May 16, 1977. Thereafter, on May 9, 1977 the Honorable Albert Lee Stephens advanced the sentencing to May 13, 1977.

b. On May 12, 1977 the Honorable Frances Whelan acting for the Honorable Albert Lee Stephens, transferred the case to Judge Turrentine, who is regularly assigned in the United States District Court for the Southern District of California.

c. The next day, on May 13, 1977 IZSAK was sentenced before the Honorable Howard B. Turrentine, to five years on Counts I, III and V running concurrent to each other and three years on Counts II and IV, consecutive to Counts I, III and V.

3. Affiant is further informed and believes and in reliance thereon alleges that neither the Appellant nor his then counsel of record, Paul Caruso, were informed of the reason for the transfer to Judge Turrentine, and that Paul Caruso requested that the matter be continued until such time as Judge Stephens could handle the sentencing. Nonetheless, the matter proceeded to sentencing on that date before Judge Turrentine. In fact, unbeknownst to the Appellant or his counsel, Judge Stephens apparently recused himself from further proceedings in the matter.

4. Affiant is informed and believes and in reliance thereon alleges that the basis for the transfer from Judge Stephens to Judge Turrentine was an alleged attempt to bribe Judge Stephens in order to obtain from Judge Stephens favorable treatment in the sentencing or bail

status of the Appellant, PHILIPPE IZSAK. The underlying allegations of such alleged bribery attempt were not disclosed to the Appellant or to his counsel.

5. Affiant has examined a criminal Indictment No. 77-937 filed before the United States District Court for the Central District of California on July 19, 1977 and entitled "United States of America, Plaintiff vs. Harold Glickman and James Rowe, Defendants" which charges the defendants in two counts. Count I charges a violation of Title 18 U.S.C. § 371, conspiracy to commit a violation of Title 18 U.S.C. § 1503. Count II charges the violation of Title 18 U.S.C. § 1503 and in substance and effect alleges that on or about April 8, 1977 Harold Glickman and James Rowe endeavored to influence Judge Stephens in the discharge of his duties by causing the sum of $50,000.00 to be offered directly or indirectly to Judge Stephens in order to obtain favorable treatment in the sentencing or bail status of the Appellant PHILIPPE IZSAK. A copy of the aforementioned Indictment is attached hereto, marked Exhibit "A" and incorporated herein by this reference.

6. Affiant is of the opinion that the underlying charges, whether or not they are substantiated, necessarily cast aspersions upon the Appellant PHILIPPE IZSAK, irrespective of any lack of knowledge or involvement of the Appellant in such alleged transactions. The failure to disclose to the Appellant or his counsel the basis for the transfer to Judge Turrentine, the fact that Judge Stephens had recused himself in the matter, and the underlying facts of the allegations of bribery render the sentencing before Judge Turrentine void. This Appellant, as is every criminal appellant, is entitled to be assured that the judge before whom

he is sentenced is not considering improper and unsubstantiated allegations during the course of that sentencing. The failure to disclose to the Appellant or his counsel the basis for the transfer indicates a desire on the behalf of the District Court to not disclose the underlying facts surrounding Judge Stephens' actions in recusing himself, and appear to indicate knowledge on behalf of the sentencing judge of those facts. However, the failure to disclose deprives this Appellant of any opportunity to rebut any unfounded or unwarranted allegations or innuendoes against him. The issue is especially critical in this matter in view of the fact that the Appellant was sentenced to the maximum five year sentence. This sentence was imposed although IZSAK has a minimal if not negligible criminal histroy. Furthermore, at the time of sentencing, IZSAK was a law school graduate who was preparing to take the California Bar exam.

7. Based upon all of these considerations, it is the Affiant's opinion that an immediate remand is necessary in order to ensure that this Appellant has the opportunity to be sentenced with the assurance that the sentencing court is not influenced by extraneous or improper matters.

8. Affiant, as indicated previously, has recently substituted as attorney of record in this Appeal. Affiant further requests the opportunity to file a supplemental brief on appeal in order to raise substantial issues which have not been raised in the previously filed brief. Among these issues is the propriety of the sentences imposed upon Counts II and IV, which, in Affiant's opinion, merge into the offenses for which the Defendant was convicted under Counts III and V respectively. Under such circumstances of merger, consecutive sentences are improper. See *United States v. Atkinson*, 512

F.2d 1235.

Affiant says nothing further.

Executed this 18 day of August, 1977 at Los Angeles, California.

VICTOR SHERMAN

Subscribed and sworn to before
me this 18 day of August, 1977.

Dianne Gilbert
NOTARY PUBLIC

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned,say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on SEPTEMBER 22 1978, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (IZSAK vs. UNITED STATES OF AMERICA) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at theaddresses as follows:

UNITED STATES ATTORNEY
CENTRAL DISTRICT
12th FLOOR
U. S. COURTHOUSE
LOS ANGELES, CALIFORNIA 90012
2 copies

SOLICITOR GENERAL OF THE UNITED STATES
U. S. DEPARTMENT OF JUSTICE
WASHINGTON, D. C. 20530
3 copies

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 22 978, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648
(714) 536-7161